

1. Contrary to the State's assertions, the State has the power to coordinate its agencies in promulgating and enforcing the findings of a TMDL for the Illinois River Watershed [IRW] upon point and non-point sources within the watershed;
2. The State is attempting to preclude the Defendants from utilizing the same relevant evidence regarding the TMDL which the State has relied upon in support of its own case;
3. The State's decisions, actions or inaction regarding the TMDL for the IRW are probative as to the reliability of the State's own evidence as well as the Defendants' defense that the State's inaction has played a role in creating the injuries it says were caused by the Defendants. Additionally, insofar as the regulatory TMDL process requires a comprehensive review of all sources of alleged pollution, as opposed to the Plaintiffs' exclusive focus on poultry, the TDML evidence also brings into question the probative value of Plaintiffs' evidence; and
4. Evidence regarding the status of the TMDL process for the IRW is highly relevant as it demonstrates that the State is asking the Court to place itself in the position of the Oklahoma Department of Environmental Quality. It is unnecessary for the State to call upon the extraordinary equitable powers of the Court to implement a judicial TMDL when an administrative process exists which, if implemented, would provide the same remedy to the State.

I. BACKGROUND

As part of a larger water quality management program, Section 303 of CWA requires the states to adopt water quality standards ("WQS") for their intrastate waters and submit the WQSs to the EPA for its approval. 33 U.S.C. § 1313(a)(3)(A). "A water quality standard (WQS) defines the

water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary protect the uses.” 40 C.F.R. § 130.3. These WQSs “serve the dual purposes of establishing the water quality goals for a specific water body and serving as the regulatory basis for establishment of water quality-based treatment controls and strategies beyond the technology-based level of treatment required by . . . the [Clean Water] Act.” *Id.*

In Oklahoma, the Oklahoma Water Resources Board (“OWRB”) is charged with developing the State’s WQSs. *See* OKLA. STAT. tit. 82, § 1085.30; OKLA. ADMIN. CODE §§ 35:45-1-4(a) and 785:45-1-1. In establishing a WQS,

States first set out designated uses for all of their water bodies, e.g., recreation, fishing, and agricultural, and then set the quality of the water required to achieve those uses. Water quality standards are to be established taking into consideration “their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and . . . their use and value for navigation.” Because the goal of water quality standard regulation is to meet desired water body uses, it does not discriminate against the type of pollution. In other words, whether the pollution came from a point source or a nonpoint source does not matter, instead the focus of the water quality standard regulation is ridding waters of any pollutant that is causing it to not achieve its designated uses.

Cynthia D. Norgart, *Florida’s Impaired Waters Rule: Is There a “Method” to the Madness?*, 19 J. LAND USE & ENVTL. L. 347, 352 (2004).

The WQS “are the State’s goals for individual water bodies and provide the legal basis for control decisions under the [Clean Water] Act.” 40 C.F.R. § 130.0(b). The State must also establish monitoring methods and procedures to compile data needed to analyze water quality. 40 C.F.R. § 130.4(a). The federal regulations state that the monitoring data will be used in “determining abatement and control priorities; developing and reviewing water quality standards, total maximum daily loads, wasteload allocations and load allocations; assessing compliance with National Pollutant Discharge Elimination System (NPDES) permits by dischargers; reporting

information to the public through the section 305(b) report and reviewing site-specific monitoring efforts.” *Id.* § 130.4(b).

Each of the State’s “environmental agencies” is responsible for utilizing and enforcing the WQS. *See* OKLA. STAT. tit. 27A, § 1-1-202(a)(2). These environmental agencies are the OWRB, the Oklahoma Corporation Commission, the Oklahoma Department of Agriculture, the Oklahoma Conservation Commission, the Oklahoma Department of Wildlife Conservation, the Oklahoma Department of Mines, and the ODEQ. *See id.* § 1-1-102(13).

After this initial information is gathered, the maximum loading capacity for the water body will be determined on a case-by-case basis, generally using water quality models developed for the particular water body. *Id.* Once this maximum loading capacity is determined, the pollutant loadings can be allocated using additional information regarding future growth, flow and load variations, temporal variations, the CWA antibacksliding requirements, antidegradation requirements, pollutant allocation schemes, margin of safety to account for uncertainty in the data, and other pertinent information. *See id.* at 158-59. In the 2006 CPP, ODEQ reiterates these same principles. Notably, this case was pending during 2006.

Ultimately, this process culminates with the TMDL loading allocation which allocates “pollutant loads among various point, non-point, natural background sources, and margin of safety.” *Id.* at 160. Clearly, the TMDL is meant to be an exhaustive and comprehensive approach to remedying 303(d) water bodies administered by the ODEQ. Once a TMDL is in place for a 303(d) water body, it can be revised only under certain circumstances identified in the CWA. *See* 33 U.S.C. § 1313(d)(4).

Oklahoma has already undertaken to define the necessary steps for developing a TMDL for an impaired waterbody. In 2002, the ODEQ’s Continuing Planning Process described the steps as:

(1) assessing existing conditions of the waterbody; (2) identifying and analyzing pollutant sources; and (3) allocating loadings among pollutant sources. OKLA. DEP'T ENV. QUALITY, CONTINUING PLANNING PROCESS 156, at 157-158 (2002) [hereinafter "2002 CPP"]. This assessment of existing conditions is comprised of an assessment of the particular waterbody, evaluation of existing data, and identification of additional data requirements. 2002 CPP at 157. The 2002 CPP also notes that, before pollutant loads are allocated, "the location and types of sources, and the current and projected pollutant load (flow, concentration, permit limits) for each source must be identified." *Id.* The data necessary for this evaluation is comprised of, *inter alia*, watershed and sub-watershed boundaries, hydrologic interaction between surface water and groundwater, location of stream segments, location of pollutant sources, types of pollutant sources, anticipated growth of discharges, meteorological/rainfall data and runoff coefficients, land uses and land cover, and soil types. *Id.* In addition, before the pollutant loads are allocated, the promulgating body must differentiate point and non-point sources, including forestry operations, urban runoff, construction activities and other sources including natural background. *Id.* at 158.

II. ARGUMENT AND AUTHORITY

Evidence is considered relevant to the extent it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probably than it would be without the evidence." Fed. R. Evid. 401; *Owner-Operator Indep. Drivers Ass'n v. USIS Commer. Serv.*, 537 F.3d 1184, 1193 (10th Cir. 2008). Evidence that is relevant is generally admissible. Fed. R. Evid. 402. It is within the sound discretion of the trial court to determine whether evidence is relevant. *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1518 (10th Cir. 1995). In this matter, the existence, promulgation or lack thereof of a TMDL by the State is a fact of consequence which tends to show that a regulatory scheme is in place,

which, if instituted, would provide the same relief sought by the State – the remediation and restoration of the IRW.

A. THE STATE’S AUTHORITY AND OBLIGATION TO REGULATE NON-POINT SOURCES UNDER THE CWA AND OKLAHOMA LAW IS RELEVANT

Contrary to the State’s assertion that the TMDL is merely a planning tool limited to only addressing nutrient loading from point sources, the State not only has the authority, but the obligation to address nutrient loading from non-point sources under the TMDL process. The State’s arguments in this regard are purposefully misleading. The State claims its obligations under the CWA are limited only to those regulatory powers maintained by ODEQ. On one hand, albeit it in a footnote, the State recognizes that other Oklahoma state agencies have the power to regulate non-point sources. Yet, on the other, it argues that the power to implement necessary controls identified by a TMDL to the ODEQ.

As stated above, the State is required to establish a TMDL for the applicable pollutants for each of the waters it has identified that it has listed on its “303(d) list pursuant to 40 C.F.R. § 130.7(b)(1). 33 U.S.C. § 1313(d)(1)(C). A TMDL is “a device to assure attainment of water quality goals by calculating the amount of allowable pollutants that may be discharged into a water body and allocating these loads among pollutant sources.” Jeffrey M. Gaba, *New Sources, New Growth and the Clean Water Act*, 55 ALA. L. REV. 651, 652 (2004). The TMDL is supposed to establish the maximum level of pollutants that an impaired waterbody can take with exceeding the established WQS for that waterbody. Cynthia D. Norgart, *Florida’s Impaired Waters Rule: Is There a “Method” to the Madness?*, 19 J. LAND USE & ENVTL. L. 347, 348 (2004). Indeed, the EPA described the purpose and goal of a TMDL as follows:

TMDLs shall be established at levels necessary to attain and maintain the applicable narrative and numerical WQLS [water quality limited segments] with seasonal variations and a margin of safety which takes into account the relationship between effluent limitations and water quality.

40 C.F.R. § 130.7(c)(1). More importantly, the State has described the purpose of a TMDL as “a written, pollutant-specific and water body-specific plan establishing pollutant loads for point and **nonpoint sources**, incorporating safety reserves, to ensure that a specific water body will attain and maintain the water quality necessary to support existing and designated beneficial uses”. See OKLA. ADMIN. CODE § 35:45-1-2

The State’s entire argument that evidence of the existence or non-existence of a TMDL for the water bodies within the IRW is built on the premise that, because the EPA does not regulate non-point sources under the CWA, the CWA simply does not apply to alleged non-point source pollution. Contrary to this unsupported position, the CWA does regulate both point and non-point sources. *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1140 n. 4 (10th Cir. 2005)(citing 33 U.S.C. §§ 1288, 1329) . Moreover, the State is already engaged in the regulation of poultry litter, an alleged non-point source contributor to the alleged water impairments in the IRW. Through those regulatory powers, the State could institute any findings from a TMDL which relate to the practice of the land application of poultry litter.

The Oklahoma Department of Environmental Quality (“ODEQ”) is charged with establishing, implementing, and enforcing the TMDLs. OKLA. STAT. tit. 27A, § 2-6-103(A)(6). By its own regulations, the ODEQ must “establish TMDLs for impaired waterbodies, including wasteload allocations for point sources and load allocations for non-point sources, in accordance with the procedures described in the CPP.” OKLA. ADMIN. CODE § 252:690-1-7. However, ODEQ is not the sole environmental agency responsible for utilizing and enforcing the Water Quality Standards and any restrictions which are identified by a TMDL. Indeed, other “environmental

agencies” are required to cooperate with ODEQ in the development and enforcement of a TMDL. *See* OKLA. STAT. tit. 27A, § 1-1-202(a)(2). These environmental agencies are the OWRB, the Oklahoma Corporation Commission, the Oklahoma Department of Agriculture, the Oklahoma Conservation Commission, the Oklahoma Department of Wildlife Conservation, the Oklahoma Department of Mines, and the ODEQ. *See id.* § 1-1-102(13). Thus, contrary to the misrepresentations by the State, the ODEQ has a **duty** to coordinate with the other environmental agencies in preparing the TMDLs. *See id.*; OKLA. STAT. tit. 27A, § 2-6-103(A)(8).

Even though loadings from non-point sources are not subject to a federal permitting program, reductions from those nonpoint sources can be enforced through the State’s authority over those non-point sources. For example, the Department of Agriculture, Food and Forestry, is the agency charged by the legislature with regulating the land application of poultry litter. Therefore, the State’s argument that it cannot regulate the activities of non-point sources is nonsensical

The TMDL is more than a mere planning process. This has been previously acknowledged by the State. In the *2006 Water Quality Assessment Integrated Report (WQAIR)*, the ODEQ recognized its duty to create a TMDL for any Category 5 impaired waterbody on the 303(d) list. (See Ex. A, 2006 *WQAIR*, Pg. 7). The ODEQ further acknowledged that until a TMDL has been completed and approved by the EPA that any impaired waterbody on the 303(d) list will remain a listed Category 5 waterbody. *See supra*. Additionally, as part of this report to the EPA, the State has provided a schedule for the completion of the TMDL. (Ex. A, Appendix C-6 to 2006 *WQAIR*).

The State has listed Lake Tenkiller and portions of the Illinois River including certain tributaries as Category 5A impaired waterbodies in both its 2002 and 2006 *WQAIR*. See Ex. A, and Ex. B, (Appendix B-29, 2002 *WQAIR*). In the 2002 report, the ODEQ represented to the EPA that

it would complete the TMDL for those listed water bodies within the IRW by 2004. At the time of the submission of the 2006 report, the completion date had been extended to 2007. To date, according to Steve Thompson, neither TMDL has been completed. (Ex. C, Deposition of Steve Thompson, pg. 108:10-13.)

Finally, the State argues the TMDL process is irrelevant because a TMDL does not provide resolution to the State's claims of pollution from activities within the State of Arkansas. The State has previously argued on many occasions that the downstream state has the authority to press its WQS on the upstream state. To the extent that the TMDL is a tool designed to meet the WQS, it would address the activities alleged in Arkansas. In this regard, contrary to the State's implication that the states may choose to follow or disregard the CWA at their discretion,² the Tenth Circuit has previously recognized the mandatory requirements and obligations placed on the State by the CWA. *Defenders of Wildlife v. EPA*, 415 F.3d 1121, 1124 (10th Cir. 2005) (noting that the CWA mandates state water quality standards and "total maximum daily loads"); *American Wildlands v. Browner*, 260 F.3d 1192, 1194, 1998 (10th Cir. 2001)(same). In other words, both Oklahoma and Arkansas are required to develop these water quality standards and, where applicable, total maximum daily loads ("TMDL") for non-point sources within their respective borders.³ Notably, the TDML program in Oklahoma specifically includes agricultural non-point sources. *See* OKLA. STAT., tit. 82 § 1457; OAC § 35:45-1-1 *et seq.* Thus, the State's concerns regarding enforcement within the borders of Arkansas are wholly without basis.

² Assuming for argument's sake the portion of the CWA that addresses non-point source pollution was discretionary, which it is not, the relevant fact in this lawsuit is that Oklahoma has adopted a program, has drafted water quality standards, and is in the process of developing for water bodies within the IRW.

³ Jon Craig, head of the Water Quality Division of ODEQ testified that he believed that Arkansas was in process of preparing a TMDL on impaired segments of the waters of the IRW in Arkansas. (Ex. D, Deposition of Jon Craig, 23:18-24:3).

Ultimately, the State's arguments that the regulatory TMDL process is merely a planning tool and that it cannot compel cooperation with itself are simply unconvincing. Unlike this lawsuit where the State has ignored alternative sources, the regulatory TMDL process requires the ODEQ to evaluate all sources of the subject pollutant and allocate loads among them. The TMDL process effectively mirrors the State's burden of proof in this case. They seek to exclude evidence related to the TMDL process because it would demonstrate that the State has not begun to meet its burden in this lawsuit.⁴

Because the State is obligated under the CWA to implement a TMDL for certain impaired waterbodies identified on the 303(d) list, and because the ODEQ has a duty to cooperate with the other environmental agencies in implementing whatever governmental restrictions are necessary to limit any loadings identified by the TMDL process including non-point sources, the State's claim that it lacks the regulatory power to implement the findings of a TMDL lacks merit.⁵ Thus, whether or not the State has undertaken the effort to promulgate and implement a TMDL in the IRW is relevant to the defense of the State's claims in this matter.

B. THE RELEVANT EVIDENCE THE STATE SEEKS TO EXCLUDE IS THE SAME EVIDENCE IT HAS RELIED UPON IN SUPPORT OF ITS CLAIMS

Interestingly, one of the State's own experts has relied upon the preliminary TMDL work performed by Dan Storm. In a hearing before this Court on July 28, 2009, the State cited the work of Dan Storm as validation of Bernard Engel's modeling work in this case. (Ex. E, July 28, 2009 Hearing, pg. 87). The State claims that the preliminary regulatory TMDL performed by Dan Storm validates the methodology used by Dr. Engel in his model. (Ex. E, July 28, 2009

⁴ Defendants reference the Court to their response to Dkt #2429 and incorporate all arguments made therein.

⁵ Teena Gunter, counsel for ODAFF and 30(b)(6) witness, testified that she believed the regulatory TMDL process to be a tool for regulating non-point sources within the watershed. (Ex. F, Deposition of Teena Gunter, August 27, 2008, pg. 72:23-73:8).

Hearing, pgs. 94-96). The State further claims that both Dr. Storm and Dr. Engel have found that septic tank discharge is an insignificant source. (Ex. E, July 28, 2009, pg. 97). Although the Defendants do not necessarily agree with the findings of the draft regulatory TMDL performed by Dr. Storm, it is indisputable that if the State is using those findings to support the work of one of its litigation experts, the existence of a regulatory TMDL is relevant in this case.

The State's motive here is clear – it wants to be able to use the draft regulatory TMDL process as a sword and shield. It argues that the work performed in furtherance of a regulatory TMDL is relevant so long as it can be used to support the findings of the State's litigation experts. While, it seeks to have the Court preclude the Defendants from using this same evidence to demonstrate not only the credibility of the State's expert's work, but the State's own participation in allowing the alleged injury to the IRW to occur and/or continue. The motive does not make this evidence irrelevant or prejudicial. It does, however, demonstrate that the evidence is probative in that it does demonstrate that the existence of a regulatory TMDL for the waters within the IRW is a fact of consequence to the resolution of this matter.

Along these same lines, in a hearing before the Court on August 18, 2009, the State represented to the Court that it had prepared a "TMDL" as a part of its litigation evidence. The State through its Motion is seeking to exclude any evidence which might contradict the findings of its litigation "TMDL" even if that evidence is the existence or findings from a regulatory TMDL. This is exactly what the Defendants anticipate doing at trial. Again, the rationale for the State's request to preclude evidence of a regulatory TMDL for the waterbodies within the IRW perfectly illustrates its probative value. The relevance of evidence is not defined by the detrimental effect it may have on a party's claims.

Finally, the State has failed to articulate how the introduction of the existence, non-existence or status of a regulatory TMDL for the water bodies within the IRW is unfairly prejudicial to it. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Fed. R. Evid. 403. The introduction of evidence that the TMDL process is the more appropriate mechanism to identify all sources of nutrient loading in the IRW as opposed to the State's litigation model does not by itself make the evidence unfairly prejudicial to the State.

Whereas the introduction of this relevant evidence is not prejudicial to the State, the prohibition of it would, in fact, result in unfair prejudice to the Defendants. *See United States v. Schrock*, 855 F.2d 327, 335 (6th Cir. 1988) (noting unfair prejudice "refers to evidence which tends to suggest decision on an improper basis"). Precluding evidence of any conclusions and results the State has reached previously with a regulatory TMDL is likely to lead to a decision which based upon the false premise that a judicially imposed TMDL, which only addresses one source of the alleged nutrient loading to the IRW, is the only viable resolution. Contrarily, allowing the Defendants to present evidence regarding the status, implementation and results of a TMDL evidence will allow the trier of fact to evaluate the appropriate mechanism for the restoration and remediation of any proven injuries to the IRW.

C. THE STATES' DECISIONS, ACTIONS OR INACTIONS REGARDING THE TMDL FOR THE IRW ARE PROBATIVE AS TO THE RELIABILITY OF THE STATE'S OWN EVIDENCE AS WELL AS THE STATE'S FAILURE TO REGULATE

The State has put forth evidence through its experts which it claims demonstrates that the application of poultry litter is the largest contributor of nutrients to waters of the IRW. Defendants anticipate putting forth evidence that the State's evidence in this regard is unreliable. More specifically, the Defendants will demonstrate that during the preparation of the regulatory

TMDL work, one modeler found that many other sources are contributing to the alleged water quality issues within the IRW. Moreover, that modeler found that in some instances those contributions were greater than any alleged contribution by the land application of poultry litter. Finally, Defendants anticipate presenting evidence that the regulatory TMDL process has been thwarted by the State for many reasons including this litigation. It is well established that a party's motivations in bringing a lawsuit are relevant evidence of bias and motive. *See, e.g., Pittsley v. Warish*, 927 F.2d 3, 10 (1st Cir. 1991) (admitting evidence of prior criminal charges against Plaintiff that "were probative in demonstrating motive and bias" in bring the present lawsuit).

Indeed, the State's decisions, actions or inactions regarding a regulatory TMDL for the IRW are relevant not only as to the reliability of the State's own litigation model, but as to the whether the State's failure to prosecute and complete the TDML for the waterbodies within the IRW as represented to the EPA has resulted in some or all of the harm it alleges the Defendants have created. Defendants anticipate demonstrating through testimony and evidence that any continuation of the alleged nutrient loading in the IRW from all sources is the result of the State's decisions and inactions regarding the TMDL. As stated above, a regulatory TMDL is the process identified by the EPA for identifying all potential sources of pollution to an impaired waterbody. Defendants claim that because of the State's litigation, a regulatory TMDL which would allow the State environmental agencies to evaluate and institute or enforce stricter regulations upon all of the potential contributors to the harm is still not in place for the impaired waterbodies within the IRW. Undoubtedly, the State's own culpability is relevant to its claims.

The fact remains that the State has been involved in the development of a regulatory TMDL in the IRW for many years. Steve Thompson, the Executive Director of ODEQ, stated in his

deposition on April 9, 2009, that the process began in 1992 long before the State's initiation of this matter. [Ex. G, Exhibits 10 and 11 to Depo. of Steve Thompson]. In fact, ODEQ hired an independent firm to complete a TMDL on Lake Tenkiller. [Ex. G, Depo. of Steve Thompson, 106:3-13]. In addition to that TMDL, a draft TMDL has been completed on the Illinois River by Dan Storm. [Ex. G, Depo. of Steve Thompson, 101-103:1, 105:19-22]. Clearly, the process, creation, results and any implementation efforts, if any, regarding these regulatory TMDLs are relevant to the credibility of the State's litigation evidence as to the major sources of nutrient loading in the IRW. Consequently, the State has yet to articulate how the admission of this relevant evidence would result in any unfair prejudice or confusion.

Consequently, the Attorney General's efforts to impede on this purely regulatory process created by the EPA under the CWA with his litigation is not only probative, but it further calls into question the validity and reliability of the State's own evidence regarding loading allocations in this matter. As a result, the reason for the State's attempt to exclude this highly relevant evidence is self-evident -- it calls into question: (1) the conclusions of its litigation experts; (2) the State's rationale for not completing this regulatory process; and (3) the ramifications for the State's failure to complete the regulatory TMDL process to the alleged existing and on-going water quality impairments in the IRW.

D. EVIDENCE REGARDING THE STATUS OF THE TMDL PROCESS IS RELEVANT AS TO THE NECESSITY OF THE COURT'S USE OF ITS EXTRAORDINARY EQUITABLE POWERS TO IMPLEMENT A JUDICIAL TMDL

The State is seeking to have the Court use its authority to issue an injunction ceasing the application of poultry litter to the lands within the IRW under the guise that this drastic measure will result in the remediation and restoration of the waters within the IRW. More specifically, the State is asking the Court to put itself in the role that the CWA and Oklahoma law have

delegated to the ODEQ and other State environmental agencies. However, before taking such extraordinary measures, the Court should be aware of the existence of a regulatory process which upon its proper implementation is more likely to provide any necessary remediation and restoration of the IRW than the State's proposed requested relief. This is because a regulatory TMDL, as stated previously, considers all sources of the alleged nutrient loading to the IRW which is something the State has refused to do in this litigation.

Ultimately, the State is seeking to have this Court use its extraordinary equitable powers to implement what would ultimately constitute a judicial TMDL absent the consideration of alternative sources. The Attorney General does not want the Defendants to present evidence to this Court that there is a mechanism that is completely within the State's power to implement. Such evidence is not only relevant, but is probative as to whether another satisfactory non-judicial resolution of the State's claims exists. Defendants are entitled to prove that the relief requested by the State can be accomplished through other more effective non-judicial means.

III. CONCLUSION

The purpose of the State's Motion in Limine is two-fold: (1) it seeks to preclude evidence which will present the Court with a full understanding of the State's ability to remediate and restore the alleged injuries it claims exist within the IRW without the assistance of the Court; and (2) it seeks to preclude evidence which calls into question the reliability and credibility of the State's evidence as to the alleged nutrient loading to the water bodies within the IRW from the land application of poultry litter. Neither of these purposes justifies the preclusion of the evidence of the existence or non-existence of a regulatory TMDL as irrelevant. To the contrary, this evidence demonstrates just how relevant the State's efforts regarding the implementation of a regulatory TMDL, any results from that regulatory TMDL, and/or any

consequences from the failure to implement a regulatory TMDL for the IRW are in this matter. Moreover, the State has failed to demonstrate how it will be unfairly prejudiced by the introduction of evidence regarding any regulatory TMDL in the IRW. Thus, Defendants respectfully request the Court deny the State's Motion in Limine to preclude any evidence or testimony as to the existence or non-existence of a regulatory TMDL.

Respectfully submitted,

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